IN THE

United States Court of Appeals

For the Ninth Circuit

1965 TERM

GILA RIVER RANCH, INC., a corporation and RUSSELL BADLEY, and CELESTE BADLEY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20643

GILA RIVER RANCH, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20644

Appeal from the United States District Court for the District of Arizona

REPLY BRIEF OF APPELLANT GILA RIVER RANCH, INC.

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Attorneys for Appellant
Gila River Ranch, Inc.

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REPLY BRIEF OF APPELLANT GILA RIVER RANCH, INC.

Counsel for the appellee must have examined a different record from that which was before appellant, Gila River Ranch, Inc., (hereinafter "Gila") when appellee prepared its Opening Brief and, indeed, must have misread Gila's Brief, since the Brief for Appellee raises and discusses legal questions which, to the knowledge of Gila, had not been posed by its appeal. Perhaps it was easier for the United States to present questions which it

could answer and having nicely glued together a suitable legal straw man, then proceed to demolish the sickly fellow.

There are two questions to be answered on this appeal. The Government has restated one and, in restating it, has by this device likewise wholly avoided it; it has not even bothered to restate the other.

Question one is, as stated in Gila's Brief:

After judgment has been entered upon a jury verdict in a United States District Court and the District Judge has ordered either that the prevailing party file a remittitur or that a new trial be granted and a remittitur is filed and approved by the District Judge, does the District Judge thereafter, upon application of the other party to the action, have power to enlarge the consent of the remitting party, over the objection of such party?

Stated otherwise, does the mere filing of remittitur consenting to a reduction in the amount of a judgment permit a District Judge to disregard the plain language of the party's consent stating the amount of reduction agreed to and amend the judgment as filed by increasing the amount of the reduction agreed to through the device of entering a new "Judgment on Remittitur?"

The United States has refused to come to grips with this question.

Whether interest on the amount remitted, as the measure of just compensation for the use and occupation of the property subsequent to taking and prior to judgment, is or is not allowable is a question wholly irrelevant to this appeal.

The Government cites *United States v. 93.970 Acres of Land,* etc., 258 F.2d 17, 21, CA 7 (1958) which is not in point. There a defendant landowner moved for additur or for a new trial and *upon the urging* of the landowner an additur was ordered in the amount of $50,000.00 plus interest and an amended or new judgment entered reflecting this change. The authority and jurisdiction of the District Court to do this was not in issue or discussed. The Court held that an additur could not be made by the Court, *absent*

the consent of the party unfavorably affected thereby or otherwise the right to a jury trial would be violated.

The Government then argues that "at best" Gila's position is that it did not comply with the "court's clearly stated condition." If so, the remedy was that of granting the Motion for a New Trial filed by the United States—not to enlarge the consent to fit the Court's ambiguously stated condition.

The Government quotes from the Court's order granting plaintiff's Motions for Entry of Judgments, (p. 4):

> "It was so worded as it said the stipulation was to accept * * judgments on the verdicts in the two cases *reduced by the above amounts.*" (Emphasis ours)

Does not this fairly mean the judgments are to be accepted reduced in that amount? At least appellant so read it and the remittitur tendered for approval by the Court is crystal clear that it is from the amount of the judgment that the remittitur is made—not the verdicts. Certainly when we speak of a judgment reduced by the "above amount(s)" we think of a judgment reduced by $125,000.00, the "above amount."

The Government has wholly failed to even discuss the constitutional impediment to enforcing a remittitur in an amount greater than that agreed to by the party affected. We can only assume it has nothing helpful to its position to offer.

The other question clearly presented by Gila's appeal is whether or not, after a formal, written judgment has been entered upon a jury's verdict a District Judge can, without the consent of the parties or other justification spelled out in the Rules, open up or vacate such judgment and enter a new and different judgment.

To this question the Government offers no answer, helpful or otherwise.

The appellee does not even discuss the plain implication in Rule 58, Federal Rules of Civil Procedure, that once a judgment is entered *upon a jury's verdict* the Court has no jurisdiction to open, enlarge or otherwise *materially* change its terms. The sole

power of the District Court, other than by consent of the parties, is to vacate the judgment in a proper case by granting a new trial.

We assume the United States ignores this legal problem for the same reason it does not attempt to deal with the question of the validity of the Court's action in enlarging the consent to the remittitur as filed by appellant.

If the District Court cannot constitutionally order a additur to a condemnation judgment without the consent of the party adversely affected, it should follow by like reasoning that a District Judge may not, not only order an "additur" to the amount agreed to be remitted by the condemnee, but also "shove it down the throat" of the party adversely affected "whether he will or no" by entering judgment against the condemnee over his protests for the amount added to the remittitur by the District Judge.

Dimich v. Schiedt, 293 U.S. 474 (1935)

United States v. 93.970 Acres of Land, 258 F.2d 17, CA 7 (1958)

De Pinto v. Provident Security Life Insurance Co., 323 F.2d 826, CA 9 (1963)

THE BRIEF OF APPELLANTS RUSSELL AND CELESTE BADLEY

The Opening Brief of Appellants Badley is devoted to their claim that the Amended Judgment either apportioned too much of the refund to them or they should not be required to refund any amount. Their Reply Brief has not been received and hence our comments must be directed to the position taken by the Badleys in their Opening Brief.

Gila regarded the Amended Judgment as a nullity in excess of the District Judge's jurisdiction both as in contravention of Rule 58 of the Federal Rules of Civil Procedure and as violating the constitutional right of Gila to a jury trial and hence did not deal with this phase of the District Judge's action in our Opening Brief.

Appellant, Gila, is unclear as to just what posture this phase

of the appeal assumes. The action of Judge Powell of which appellants Badley complain was not taken in an adversary proceeding. The original judgment (T.R. 31, 32, 33) condemned the land involved and fixed the just compensation, but not in favor of or as payable to any party. The Motion for a New Trial did not seek a new trial as against either landowner Gila or Badley but simply a new trial. (T.R. 36, 37, 38).

The Motion for Judgment of the United States and the proposed "Judgment on Remittitur" dealt with Gila and Badley without recognizing any difference between them as defendants except for the limitation upon Badley's liability for the refund. This was the judgment entered by the Court so the Court's intent as to who should be liable for the refund is quite clear even if the language of its Order granting the Government's Motion for Judgment may have been less than explicit.

Gila filed an Objection to "Motions for Judgement" and "Judgement on Remittitur" of the United States which generally raised the same legal objections which are found in Gila's Opening Brief.

Appellants, Badley, filed an "Objection to Form of Judgement" on the same day that Gila filed its Objections. Badley raised the same contention as to the effect which should be given to the "Court's Memo Decision" by reason of the fact the Court referred there to the "defendant landowner" in ordering a remittitur or a new trial as it now raises in this Court. Judge Powell in effect found this not to have been its effect when he signed the "Judgement on Remittitur" and hence the claim must be disregarded as specious. In fact the term "defendant landowner" applies equally to the Badleys.

The main complaint of Badleys was that the proposed judgement exposed them to the entire refund of $153,125.00. Gila, in its Objections had likewise called the Court's attention to this possibility and said it was unfair. (T.R. 57).

The Court limited the Badley's exposure for refund but otherwise rejected the balance of their Objections.

Badleys, in their Opening Brief, raise claims which were never litigated and upon which evidence, directed to such claims, has never been taken. In fact a whole lawsuit is tried by the Court, *sua sponte,* without any of the parties having notice that their adversary claims were up for judicial action.

The action of Judge Powell taken without pleadings tendering the issue or evidence informing the Court as to factual matters not of record was unwarranted. Appellants make assertions which tell only a fragment of the story. They point to the fragments of the record as if the Court can view the few bones of the body exposed to view and make an accurate determination of the size, shape and appearance of the body.

The record shows that the original deposit of "estimated just compensation": was paid out, December 8, 1961, as follows: $489,940.00 to defendants, F. A. Gillespie & Sons Company, $100,000.00 to Connecticut Mutual Life Ins. Co. and $1000.00 to O. L. Bane (T.R. 106), and that on December 6, 1963, the defendants Gillespie and Bane filed disclaimers and the action was dismissed as to them without costs. (T.R. 108).

Contrary to the implications of Badleys' Opening Brief, the money they received was an apportionment of "estimated just compensation" and not of the jury award or the judgement entered thereon.

The Civil Docket of the clerk, cause No. 3586, shows that on December 24, 1964, after the trial but prior to the *entry of the original judgment* the United States deposited additional compensation in the sum of $475,400.00 a sum equal to the deficiency between the amounts originally deposited as "estimated just compensation" and the jury verdict *plus accrued interest* upon this deficiency *to date of deposit* making a total deposit of $594,287.75 (T.R. 110). Of the original "estimated just compensation" deposited, the sum of $65,660.00 had been retained by the clerk (T.R. 106, December 8, 1961 entry), which made a total sum of $659,947.75 on deposit with the clerk as "estimated just compensation" on February 26, 1965. On this date, pursuant to court order the clerk paid out this entire sum,

$52,000.00, directly to Russell Badley and Celeste Badley and the balance of $607,947.75 to Gila. (T.R. 110, entry February 26, 1965). This additional deposit was made by the United States prior to the entry of the original judgment (T.R. 110) and was withdrawn, after entry of judgment on the verdict, (including in the withdrawal the balance remaining with the clerk of the first deposits) and after the United States had filed its Motion for a New Trial but while this Motion was still pending. (T.R. 110).

It was withdrawn, not as the award of the jury or of a judgment as paid but as a withdrawal of "estimated just compensation" without prejudice and since the fund was made up of accrued interest, in part, Badleys received a part of the interest as truly as Gila did. The order authorizing this withdrawal reads (T.R. 44):

> "Ordered that the Clerk of this Court be and he is hereby directed to disburse the sum of $52,000.00 of the funds allocated and deposited with the Declaration of Taking filed in the above cause to RUSSELL BADLEY and CELESTE BADLEY, and the sum of $607,947.75 to GILA RIVER RANCH, INC., said disbursement being without prejudice as prayed for in the foregoing application."

Plainly the interest was part of the fund which was divided by agreement between Gila and Badley and plainly the accrued interest was considered in arriving at the sum Badleys should receive.

All of which does no more than point up the fact that the District Judge was a volunteer when he, *sua sponte,* elected to adjust the rights and obligations as between Badleys and Gila without a hearing being afforded either party.

Certainly there runs through Badleys' Brief the implication that maybe they were not fully represented in the trial of the case and in the following proceedings and hence Gila should be in some fashion penalized.

Certainly this should be explored on a hearing—not in ex parte statements. The facts as to whether or not Badleys freely

elected, after advice from their present counsel, to proceed as they did, should be explored—on a hearing. Who paid the heavy appraisal, deposition and legal costs should also be weighed —but in open court with free cross examination.

CONCLUSION

We respectfully submit that Judge Powell, in addition to assuming powers which have been denied United States District Judges in cases tried to juries, by increasing the amount of reduction appellants agreed to in their remittitur without their consent, also assumed the authority to adjudicate the rights and obligations as between Gila and Badleys, *sua sponte,* upon a wholly incomplete record as to all the facts which bear upon the question.

We respectfully represent that the learned Judge was in error in both respects.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Mark Wilmer